IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-6942

ENSIO RUBEN LAKESIDE, Petitioner

v.

STATE OF OREGON, Respondent

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE STATE OF OREGON

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oregon which was made and entered in the above cause, on March 17, 1977. A petition for rehearing was filed with the Oregon Supreme Court and this petition for rehearing was denied on April 12, 1977.

CITATIONS TO OPINIONS BELOW

Petitioner was charged with Escape in the Second Degree, ORS 162.155. Petitioner was found guilty by a jury and was sentenced on October 1, 1975. Petitioner appealed the judgment of the trial court to the Oregon Court of Appeals.

The Oregon Court of Appeals reversed petitioner's conviction in State of Oregon v. Ensio Ruben Lakeside, 25 Or App 539,

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549 P2d. 1287 (1976). The State of Oregon petitioned the Oregon Supreme Court for review of the opinion of the Court of Appeals and review was granted.

The Oregon Supreme Court reinstated petitioner's conviction and reversed the decision of the Oregon Court of Appeals, with one Justice dissenting in State of Oregon v. Ensio Ruben Lakeside, 277 Or 569, P2d. (1977).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3).

QUESTION PRESENTED

Is it a violation of the Self-Incrimination Clause of the Fifth Amendment to the United States Constitution and a violation of a defendant's Right to Counsel, guaranteed by the Sixth Amendment to the United States Constitution, for the trial court to comment on a defendant's failure to testify, by giving a jury instruction concerning this fact, after a defendant has made a timely objection to the giving of this instruction prior to the charge to the jury?

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved in this petition are the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

> Amendment V. "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand

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Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Amendment XIV. "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within it's jurisdiction the equal protection of the laws..."

STATEMENT OF FACTS

Petitioner was charged with Escape in the Second Degree, ORS 162.155. On September 25 and 26, 1975, petitioner stood trial. Petitioner did not take the stand during his trial. As part of his trial strategy, petitioner's counsel was careful to avoid any mention of the fact that petitioner would not take the witness stand. Petitioner's counsel made no mention of this fact in Voir Dire or opening and closing argument.

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Prior to instructing the jury, the trial court met with counsel in chambers. At that time, the trial court informed counsel that it intended to give the following instruction:

> "Under the laws of this State, a defendant has the option to take the witness stand to testify in his or her behalf. If a defendant chooses not to testify, such a circumstance gives rise to no inference or presumption against the defendant, and this must not be considered by you in determining the question of guilt or innocence."

Petitioner's counsel informed the court that he did not want this instruction to be given. He stated that giving the instruction was like "waving a red flag in front of the jury". The trial court gave the instruction over petitioner's timely objection. Petitioner took exception to the giving of the instruction.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE ISSUED

I.

The importance of the issues raised outside of the facts of the specific case.

The specific issue raised in this petition is very narrow and it is whether or not it is reversible error for a trial judge to instruct a jury concerning the failure of a defendant to testify, when defense counsel has objected to the giving of this instruction prior to the giving of the instruction.

This is not a case where no objection is made prior to the giving of the "failure to testify" instruction, and the court

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gives such an instruction sua sponte. This is not a case where the court gives such an instruction sua sponte and objection is made after the instruction is given. This is not a case where one co-defendant asks for the instruction and the other co-defendant objects.

The specific issue raised in this petition has been litigated in many state and federal jurisdictions and there is a split of authority in both the state and federal jurisdictions on this issue. Several state and federal courts have held, either directly or in dicta, that it is error for a court to instruct a jury concerning the failure of a defendant to testify when defense counsel has made a timely objection to the giving of the instruction: State cases - People v. Molano, 253 Cal App 2d 841, 61 Cal Rptr 821 (1967); Russel v. State, 240 Ark 97, 398 SW 2d 213 (1966); Villines v. State, 492 P2d 343 (Okla Ct of Crim Appeals, 1971); Gross v. State, 306 NE2d 371 (Ind. Supp., 1974); People v. Horrigan, 253 Cal App 2d 519, 61 Cal Rptr 403 (1967); State v. White, 285 A2d 832 (Me, 1972); State v. Kimball, 176 NW2d 864 (Iowa, 1970), Federal cases - U.S. v. Smith, 392 F2d. 302 (CA4, 1968); Mengarelli v. U.S. Marshall, 476 F2d. 617 (CA 9, 1973).

Several state and federal courts have held that it is not error for a court to instruct a jury concerning the failure of a defendant to testify even though defense counsel has made a timely objection to the giving of the instruction: State cases - State v. Goldstein, 65 Wash. 2d 901, 400 P2d. 368 (1965), cert den

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382 U.S. 895 (1965); Pearson v. State, 28 Md. App. 196, 343 A2d. 916 (1975); Rogers v. State, 486 SW2d. 786 (Tex Cr App 1972); Harvey v. State, 187 So 2d 59 (Fla App 1966), cert den 386 U.S. 923 (1967); State v. Baxter, 51 Haw 57, 454 P2d. 366 (1969), cert den 397 U.S. 955 (1970). Federal cases - United States v. Schwartz, 398 F2d. 464 (CA 7, 1968), cert den 393 U.S. 1062 (1969); United States v. McGann, 431 F2d 1104 (CA 5, 1970); United States v. Rimanich, 422 F2d 817 (CA 7 1970).

When the Oregon Supreme Court decided the case at bar it pointed out that it had to decide whether the giving of the instruction over prior objection was an invasion of constitutional rights "without help from the one source which could put the issue to rest; namely, the United States Supreme Court." State v. Lakeside, supra., 277 Or. at 587. Since this issue arises from time to time in both the state and federal jurisdictions, it would be helpful if this court would put the issue to rest by accepting review of this case.

II.

Why giving the "failure to testify" instruction over objection of defense counsel violates the Fifth Amendment to the United States Constitution,

In Griffin v. California, 380 U.S. 609 (1965), the defendant did not testify at his trial. The prosecutor commented to the jury on the failure of the defendant to testify. The trial court instructed the jury that the defendant had a constitutional right not to testify but went on to say that the jury could consider

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this failure to testify as evidence bearing on the question of whether or not he was guilty of the crime charged. This court held that the Fifth Amendment forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.

In People v. Molano, 253 Cal App 2d. 841, 61 Cal Rptr 821 (1967) an instruction identical in content to the instruction given in the case at bar was given over objection of defense counsel. The California Court of Appeals, Second District, Division Four held that:

> "Since Griffin v. State of California, (Apr. 1965) 380 US 609, 85 S Ct 1229, 14 L Ed 2d 106, either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt, are forbidden. Defendant contends, and we believe correctly so, that to give this instruction when he did not want it to be given, was tantamount to making a 'comment' proscribed by Griffin. The argument being that such an instruction highlights and emphasizes the fact that the accused did not take the stand.
>
> "Particularly apt here, we believe, is the comment of Mr. Justice Douglas in his dissenting opinion in United States v. Gainey, (Mar. 1965) 380 US 63, 73 ...
>
> 'Just as it is improper for counsel to argue from the defendant's silence, so is it improper for the trial judge to call attention to the fact of defendant's silence. Indeed, under 18 U.S.C. Section 3481, the defendant is entitled as a matter of right to have the trial judge expressly tell the jury that it must not attach any importance to the defendant's failure to testify; or if the defendant sees fit, he may choose to have no mention made of his silence by anyone. Bruno v. United States, 308 US 287, 60 S Ct 198, 84 L Ed 257' [Emphasis added]" Id. 61 Cal Rptr at 824-825.

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Although, as discussed below in part IV, it is often necessary to have the "failure to testify" instruction given to protect a defendant's rights, under certain circumstances, the giving of the instruction constitutes a "comment" on the failure of the defendant to testify and is as detrimental to a defendant's position as an illegal comment by the prosecutor about this fact.

III.

Why the giving of the "failure to testify" instruction, over objection, violates the Sixth Amendment to the United States Constitution.

In United States v. Ash, 413 U.S. 305, (1973) this court discussed the historical background of the Sixth Amendment:

> "A concern of more lasting importance was the recognition and awareness that an unaided layman had little skill in arguing the law or coping with an intricate procedural system. The function of counsel as a guide to complex legal technicalities long has been recognized by this Court. Mr. Justice Sutherland's well known observations in Powell bear repeating here:
>
> > 'Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge or evidence that is irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against

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him. Without it, though he be not guilty he faces the danger of conviction because he does not know how to establish his innocence.' 287 U.S., at 69, 53 S. Ct., at 64.

"The Court frequently has interpreted the Sixth Amendment to assure that the 'guiding hand of counsel' is available to those in need of it's assistance . . . " Id., 413 U.S. at 307-308.

Later on the Court stated that:

". . . Mr. Justice Balck, writing for the Court in Johnson v. Zerbst, 304 U.S. 458, 462-463, 58 S. Ct. 1019, 1022, 82 L Ed 1461 (1938), spoke of this equalizing effect of the Sixth Amendment's counsel guarantee:

'It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel'

"This historical background suggests that the core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." Id., 413 U.S. at 309.

Petitioner is indigent and had to have an attorney appointed to represent him so that he, a layman, might have the benefit of the advice of someone trained in the law at his trial. Petitioner's counsel decided that it would be adverse to petitioner's interests to have petitioner testify at his trial. As part of his trial strategy, petitioner made no mention of this fact during voir dire or opening and closing arguments. Petitioner's counsel made no comment on the petitioner's failure

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to testify because petitioner's counsel did not want to highlight this point. When the trial court gave the objected to instruction, it called attention to the fact that petitioner did not testify and destroyed all the possible benefit that might have inured to petitioner because of the trial strategy. Additionally, had petitioner's counsel known that the trial court was going to give the "failure to testify" instruction, petitioner's counsel might have changed his strategy and voir dired the jury on the effect that not having the petitioner testify might have on each individual juror.

The Sixth Amendment guarantees a defendant the right to have counsel to advise him at his trial. One of the functions of an attorney is to plan a trial strategy. The selection of witnesses, the content of voir dire, the content of direct and cross examination and the content of opening and closing arguments are often dictated by the trial strategy. Obviously, a judge has a duty to interfere with a trial strategy that violates, for instance, the rules of evidence. If petitioner's counsel, as part of his trial strategy, had sought to introduce inadmissible hearsay evidence, the court would have to interfere with the trial strategy by keeping such evidence out of the trial. However, under the specific facts in the case at bar, there was no rule of law which mandated the giving of the instruction. It makes a mockery of the Sixth Amendment to hold that a defendant has a right to counsel, but then permit a judge to overrule the advice that that counsel gives to a defendant, when there is no legal basis for interfering.

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IV.

Since it is reversible error for a trial court to refuse to give the "failure to testify" instruction when requested by defense counsel, how can it be reversible error for the court to give such an instruction?

Under federal law, Bruno v. United States, 308 US 287 (1959), and the law of the State of Oregon, State v. Hale, 22 Or App 144, 537 P2d 1173 (1975), a defendant has an absolute right to have the "failure to testify" instruction given. The argument is frequently made that if it is reversible error for a trial court to refuse to give this instruction, it can not be reversible error to give the instruction. In State v. Baxter, supra., 454 P2d at 367, the Hawaii Supreme Court stated that:

> "We can not see how an identical instruction will affect a jury differently by the fact that, unbeknown to it, in one case there was an objection and in the other there was not..."

The wording of the "failure to testify" instruction is not at issue here. What is at issue is the giving of the instruction at all.

Under certain circumstances, it is advantageous to have the trial court instruct the jury concerning the defendant's failure to testify. If the defendant can not take the stand for some reason and there is evidence in the trial that can only be explained by the defendant, then defense counsel would want to have a "failure to testify" instruction given to the jury in hopes that they will not hold the defendant's failure to testify against him.

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Under other circumstances, it is extremely disadvantageous to have a "failure to testify" instruction given. Suppose that defendant puts on an alibi defense and produces several witnesses who testify that the defendant was at some place other than the scene of the crime at the time that the crime was committed. Furthermore, assume that the defendant has a lengthy criminal record, including convictions for the crime charged, and makes a bad appearance on the stand. Since the defendant would add nothing to the testimony of the alibi witnesses and would injure his cause by taking the stand, trial strategy would dictate that defense counsel not put defendant on the stand and try to call as little attention as possible to the defendant's failure to take the stand. If the defendant's witnesses supply all of the information that the defendant would supply had he taken the stand, the jury will probably not think too much of the defendant's failure to take the stand. Under such circumstances, defense counsel would not want to have the failure of the defendant to take the stand highlighted by the giving of an instruction concerning this fact.

The giving of an identically worded "failure to testify" instruction can be harmful or helpful depending on the facts of the individual case. Defense counsel, if competent, is the best person to determine when the failure to testify instruction should be given. If defense counsel determines that the giving of the instruction will be detrimental to his client, it is a violation of both the Fifth and Sixth Amendments to the United

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States Constitution for a trial judge to give that instruction over objection.

CONCLUSION

For the foregoing reasons, petitioner prays that a Writ of Certiorari issued to review the judgment rendered by the Oregon Supreme Court in this case.

Respectfully submitted,

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